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Alfred L. Brophy

Shubha Ghosh

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## WHISTLING DIXIE: THE INVALIDITY AND UNCONSTITUTIONALITY OF COVENANTS AGAINST YANKEES

ALFRED L. BROPHY†  
SHUBHA GHOSH††

[Northerners are] a people lost to all shame . . . [c]owards by nature, thieves upon principle, and assassins at heart . . . . [T]he tiger that laps blood, and the beetle that gorges excrement, are but Yankees of the animal kingdom . . . our feelings towards . . . [these] scarabi and vipers of humanity should be characterized neither by rage nor by nausea, but by a fixed, cheerful Christian determination to . . . curb their inordinate and bloody lusts by such adequate means as natural wit suggests; and, as a general thing, to kill them . . . without idle questions as to whether they are reptiles or vermin.

—John Daniel, *Richmond Enquirer*, 1863.<sup>1</sup>

The property shall never be leased, sold, bequeathed, devised or otherwise transferred, permanently or temporally, to any person or entity that may be described as being part of the Yankee race. “Yankee” . . . shall mean any person or entity born or formed north of the Mason-Dixon line, or any person or entity who has lived or been located for a continuous period of one (1) year above said line.

. . . .

The covenants and restrictions are necessary to ensure that the Yankees will never again own or control large tracts of land that rightfully belong in Southern hands and under Southern domination. They are intended to prevent Yankee ownership of property stolen or conscripted after the great war of Northern aggression after 1865 by the Yankee carpetbaggers and scalawags. Delta Plantation

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† Professor of Law, Oklahoma City University.

†† Associate Professor of Law, Georgia State University. Professor Ghosh is primarily responsible for part III; Professor Brophy is primarily responsible for parts I and II.

1. THE RICHMOND EXAMINER DURING THE WAR 65-68 (Frederick S. Daniel ed., 1868) (reprinting editorial by John Daniel from *Richmond Enquirer* Jan. 26, 1863).

will once again be available to the true Southerners to view, camp, hunt, fish, use, enjoy and share as true Southerners are taught from birth.

Thank you sir.

—Henry Ingram, Deed Restrictions on Delta Plantation, 1998.<sup>2</sup>

One hundred and thirty-four years after the Civil War ended, there seems to be a (slight) softening of attitudes towards Yankees. Henry Ingram attracted substantial attention recently by recording restrictive covenants on his South Carolina property, Delta Plantation, that purport to prohibit people who have lived north of the Mason-Dixon line for more than one year from ever purchasing the property. The covenants have generated amusing public interest stories in newspapers throughout the nation.<sup>3</sup> They also raise some important issues in real property law.

Despite statements in newspaper stories suggesting that such covenants may be enforceable,<sup>4</sup> there are three distinct problems with these covenants. First, they probably violate the common law rule against restraints on alienation.<sup>5</sup> Second, they may violate the Fair Housing Act.<sup>6</sup> Finally, the Equal Protection Clause of the United States Constitution most likely prohibits them.<sup>7</sup> This Comment uses these amusing covenants to explore recent developments in real property law. Part I explains the covenants' provisions, and

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2. *Yankee Restrictions*, ARK. DEMOCRAT-GAZETTE, Feb. 7, 1998, at A2 (reprinting excerpts from Mr. Ingram's deed restrictions).

3. See, e.g., *Yankee Stay Home! Southern Hospitality on Hold*, A.B.A. J. 14 (April 1998); *In Dixieland Owner Makes His Stand; No 'Scalawags' Need Try to Buy Plantation*, WASH. POST, Feb. 21, 1998, at F6; Bruce Smith, *Owner Says 'No' to Yanks in Dixie*, CHI. TRIB., Feb. 15, 1998, at M3; *'Yankees, Stay Out,' Plantation Owner Says: Man Bars Visitors From Up North*, DAILY OKLAHOMAN, Feb. 7, 1998, at A15; *Landowner Makes a Stand Against a Yankee Invasion*, PLAIN DEALER (CLEV.), Feb. 7, 1998, at A10 (all describing these restrictive covenants).

4. See Bruce Smith, *Plantation Owner Bars All 'Yankees', No One with the Name of Sherman Allowed to Buy His Land, Either*, CHARLESTON GAZETTE, Feb. 7, 1998, at P4C (stating "[f]ederal laws prevent discrimination on the basis of race, color, religion, handicap, marital status or national origin, but say nothing about geography within the United States").

5. See THOMAS E. ATKINSON ET AL., AMERICAN LAW OF PROPERTY § 26.3, at 412-14 (1952).

6. See Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1994). The statute provides "[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." *Id.* § 3601. See *United States v. City of Panama*, 494 F. Supp. 1049 (D.C. Ohio 1980), *aff'd* 661 F.2d 562 (6th Cir. 1981) (stating that statute was enacted to ensure and encourage removal of barriers that operate to discriminate in housing).

7. See U.S. Const. amend. XIV, § 1.

Parts II and III examine the various legal problems the covenants raise.

# I. "THEY'RE WORSE THAN FIRE ANTS."<sup>8</sup>

According to recent newspaper accounts, Henry Ingram recorded restrictive covenants that prohibit the sale or lease of his property, the Delta Plantation, just north of Savannah, Georgia, to members of the "Yankee" race.<sup>9</sup> The covenants also prohibit the sale or lease of this property to anyone with the last name Sherman, or those whose name may be spelled using the letters Sherman, if born "up North."<sup>10</sup> The covenants further prohibit use of redwood lumber on the property, seemingly because some redwoods are named after General Sherman.<sup>11</sup>

Mr. Ingram's motivation (besides publicity),<sup>12</sup> appears to stem from two sources. The first source is a generations-old grudge against General Sherman and a more recent grudge against Yankee investors.<sup>13</sup> The second source of motivation is a concern that the influence of Northerners has begun to change the character of South Carolina and Georgia.<sup>14</sup> "Slowly but surely they have taken over Hilton Head, they've taken over Beaufort County. They're infiltrating Jasper County . . . They're worse than fire ants."<sup>15</sup> Mr. Ingram has clearly stated his intent to continue to control the use of the property even after he has sold it, telling the *Beauford Gazette*, "Yankee development is ruining the South."<sup>16</sup> He further stated that "[t]his is the prettiest piece of land in the county, and I want to keep it that way. I want to make sure no one has access to it that I don't want to be there."<sup>17</sup>

8. Smith, *supra* note 4, at 4C (explaining Mr. Ingram's perception that Yankees are invading Southern states).

9. *See id.* (identifying location of land).

10. *Yankee Restrictions*, *supra* note 2, at A2 (explaining that name "Sherman" is associated with "the late coward and war criminal William T. Sherman").

11. *See id.*

12. *See Old Times There Have Been Forgotten*, WILMINGTON STAR-NEWS, Feb. 21, 1998, at A8 (calling Ingram "publicity hound").

13. *See* Terry Plumb, *Yankee Green Favorite Color*, HERALD (Rock Hill, S.C.), Feb. 15, 1998, at E1 (alleging Ingram spent time in jail for soliciting "Yankee" undercover FBI agent for prostitution business).

14. *See* Smith, *supra* note 4, at 14C (providing commentary of perceived bad influence of Northerners on Southern states).

15. Smith, *supra* note 4, at P4C (stating Ingram's rationale for hatred of "Yankees" and subsequent restrictive covenants).

16. Plumb, *supra* note 13, at E1 (quoting Ingram).

17. Smith, *supra* note 4, at M3 (quoting Ingram and noting that Ingram's land consists of 1,688 acre tract, composed mostly of old rice fields).

The property has a colorful heritage. Delta Plantation was established in 1829 by South Carolinian Langdon Cheves.<sup>18</sup> One may find Ingram's restriction against Yankees even more amusing when one considers that Cheves lived in Philadelphia from 1819 to 1829, while he served as President of the Bank of the United States.<sup>19</sup> It is very possible that a buyer with Cheves' characteristics could not purchase the plantation. Cheves' Southern credentials should not, however, be questioned: he died in South Carolina, where he lived after leaving Philadelphia and his daughter, Louisa McCord, was one of the most important proslavery theorists in the 1850's.<sup>20</sup>

Mr. Ingram recites the purposes of the covenants in the deed: they are intended to "prevent Yankee ownership of property stolen or conscripted after the great war of Northern aggression after 1865 by the Yankee carpetbaggers and scalawags."<sup>21</sup> Mr. Ingram has recently modified the covenants to allow Yankees to purchase the property if they take a "Southern oath" in which they promise that "when speaking of Yankees, I will refer to them as scalawags or carpetbaggers."<sup>22</sup> Moreover, a "Yankee" must "whistle or hum 'Dixie' as a sign of my loyalty and as a token of my new outlook on life."<sup>23</sup>

## II. COMMON LAW PROBLEMS WITH THE COVENANT: THE LIMITED VALIDITY OF PARTIAL, DIRECT RESTRAINTS ON ALIENATION

Thanks to Progress and the genius of American democracy, persons who used to be called carpetbaggers and persons who used to be called scalawags are now called Republicans.<sup>24</sup>

Covenants that directly restrict the alienability of real property are generally suspect.<sup>25</sup> Mr. Ingram's covenants directly restrict

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18. See LOUISA MCCORD, POLITICAL AND SOCIAL ESSAYS 12-35 (Richard C. Lounsbury ed., 1995) (explaining development of Cheves family).

19. See *id.* at 13.

20. See *id.* at 1-11, 21-23 (explaining Louisa McCord's role as pivotal historical figure and her father's death).

21. *Yankee Restrictions*, *supra* note 2, at A2.

22. *In Dixieland, Owner Takes His Stand*, *supra* note 3, at F6.

23. *Id.* The fact that "scalawags" refers to Southerners, not Northerners, and is, therefore, an inappropriate term for Yankees, may demonstrate Mr. Ingram's own lack of Southern *bona fides*. See ERIC FONER, RECONSTRUCTION xix, 294 (1988) (defining scalawags as "unprincipled White Southerners" and as "native Southerners who cast their lot politically with the freedmen").

24. *Old Times There Have Been Forgotten*, *supra* note 12, at A8.

25. See RESTATEMENT OF PROPERTY § 406(b) (1944) (stating restraints on alienation are valid only if they are "qualified so as to permit alienation to some though not all possible alienees"). Mr. Ingram's case, however, is not the easy case of a

alienation of Delta Plantation and, therefore, are unlikely to be enforced by South Carolina courts. Mr. Ingram's covenants are promissory covenants, which aim to restrain the sale of Delta Plantation to Yankees.<sup>26</sup> While absolute restraints on alienation are prohibited, it is casebook law (as property professors like to say) that partial restraints "are sometimes upheld."<sup>27</sup> Partial restraints may take several forms. First, they may limit all alienation for a period of time, such as for the lifetime of the grantee. Such limitations are usually invalid.<sup>28</sup> Alternatively, partial restraints may restrict the manner of alienation, such as requiring the permission of a condominium owners' association. Such restraints are sometimes upheld.<sup>29</sup> Finally, they may attempt to limit the group of people who

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covenant that completely prohibits alienation. Such a prohibition is invalid. *See Stamey v. McGinnis*, 88 S.E. 935 (Ga. 1916) (holding absolute restraint void, even though for limited time).

26. *See* RESTATEMENT OF PROPERTY §§ 404(1)(2), 404(1)(3) cmt. h, illus. 6 (1944). Because the deed apparently contains no provisions detailing the liability for violation of the covenants, the covenants will be construed as a promissory restraint, subjecting the violator to damages as well as an injunction. The covenant will not be construed as a forfeiture restraint, which would terminate the conveyer's interest in the plantation, or a disabling restraint. A disabling restraint requires some statement that the transaction is voided if there is a violation of the covenant; the forfeiture restraint always appears as an executory limitation, a special limitation, or a condition subsequent. *See id.* § 405, cmt. a.

27. JOSEPH SINGER, PROPERTY 574 (2d ed. 1997). *See also* CHARLES DONAHUE ET AL., PROPERTY 468 (3d ed. 1993); JESSE DUKEMINIER & JAMES KRIER, PROPERTY 224 (3d ed. 1993) (both discussing restraints on alienation as part of their property law casebooks).

28. *See Stamey*, 88 S.E. at 935 (stating that attempted restraint on grantee's sale during her life of property is ineffective; she held title in fee simple absolute); *Kessner v. Phillips*, 88 S.W. 66 (Mo. 1905) (holding absolute restraint on alienation of grantee's property during life invalid as restraint on alienation) *cited with approval in* *Lynch v. Lynch*, 159 S.E. 26 (S.C. 1931). *But see Lynch*, 159 S.E. 26 (upholding prohibition on sale during grantee's life). In *Lynch*, the property was transferred with a covenant restricting transfer to creditors of the transferor's estate. *Id.* at 27, 30. The court found this acceptable because the property is:

[O]nly restrained by the limitation that an attempt by a creditor of W.S. Lynch to subject the property to the payment of debt will defeat his estate and result in the substitution of another as the holder of the title without further limitations or restrictions . . . a partial restraint for a particular purpose, which appears to be permissible.

*Id.* at 30.

29. *See, e.g., Aquarian Found., Inc. v. Shalom House, Inc.*, 448 So. 2d 1166 (Fla. Dist. Ct. App. 1984) (commenting on unique nature of condominium communities). In *Aquarian Foundation*, the court explained that condominium communities have the goal of promoting "the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common . . ." *Id.* at 1167 (citing *Hidden Harbor Estates, Inc. v. Norman*, 309 So. 2d 180, 181-82 (Fla. Dist. Ct. App. 1975)). The court permitted restriction on sale without the owners' association approval "as a valid means of insuring the [condominium] association's ability to control the composition of the condominium as a whole." *Id.* at 1167. This limitation cannot be an unfettered

may purchase the property.<sup>30</sup> Direct but partial restraints on alienation may be upheld if they prohibit sale to only a small group of people, such as descendants from one branch of the family.<sup>31</sup>

Partial restraints are valid, according to the *Restatement of Property*, only to the extent they are "reasonable under the circumstances."<sup>32</sup> As happens so often with legal tests, the difficult task lies

restriction, however, and will not be upheld if found to violate significant public policy or a constitutional right. See *id.* at 1169.

30. Cf. *Riste v. Eastern Wash. Bible Camp*, 605 P.2d 1294 (Wash. Ct. App. 1980) (finding restraint on sale to people outside the grantor's religion prohibited by both statute and common law).

31. See *Overton v. Lea*, 68 S.W. 250 (Tenn. 1902). *Overton* upheld a grant prohibiting a devise of property to the grantor's sister. "It is well settled that any conditional limitation upon the power of alienation which is so restricted as not to be inconsistent with a reasonable enjoyment of the fee is valid." *Id.* at 262. The court upheld this restriction based upon its narrow scope, recognizing that "if the estate had been given on condition that Mrs. Lea should not alien to anyone, such a condition would be void." *Id.*

These restrictions may also be valid if land is granted conditioned on its being held within a family for a limited time. See *Blevins v. Pittman*, 7 S.E.2d 662, 664 (Ga. 1940) (upholding grant to nephew restricting transfer to spouse or children as limited restriction not "repugnant to the nature of the estate granted, contrary to law, contrary to public policy, . . . [or] prevent[ing] performance of parental duties"). But see *Jackson v. Jackson*, 113 S.E.2d 766 (Ga. 1960) (noting broader restraint against sale to anyone "not a member of . . . Jackson family bearing Jackson name" invalid; estate becomes fee simple absolute in grantee).

In tracing the authority supporting partial, direct restraints on alienation, one quickly arrives at cases construing racially restrictive covenants. Those cases sometimes construe the covenant as a restriction on use, not on alienation. See *Los Angeles Inv. Co. v. Gary*, 186 P. 596, 597 (Cal. 1919) (upholding racially restrictive covenant as restriction on use). Restrictions on use are more frequently upheld than restrictions on alienation. The restriction on sale to Yankees, however, is not phrased as a restriction on use, and is much different from typical use restrictions, such as those prohibiting "slaughter-houses, soap-factories, distilleries, livery-stables, tanneries, and machine-shops." *Cowell v. Springs Co.*, 100 U.S. 55, 57 (1879) (*cited in Lynch*, 159 S.E. at 10).

32. *RESTATEMENT OF PROPERTY* § 406(c) (1944). Or, as the South Carolina Supreme Court interpreted it, "[t]he weight of authority clearly supports the view that a limited restraint upon alienation for a particular purpose is not repugnant to the grant of a fee simple estate." *Lynch*, 159 S.E. at 30. Further, the court defined a repugnant condition as one that "tend[s] to the utter subversion of the estate, such as prohibit[s] entirely the alienation or use of the property." *Id.* See also 10 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 843 (1998).

South Carolina courts have freely drawn upon other states' decisions, treatises, and the *Restatement of Property* in fashioning the law of restrictive covenants. See, e.g., *Lynch*, 159 S.E. at 30. See also *Marathon Finance Co. v. HHC Liquidation Corp.*, 483 S.E.2d 757, 764 (S.C. Ct. App. 1997) (dissenting from vacation of injunction based on covenant that restrained alienation and referring to *Restatement of Property* and *Restatement (Third) of Property* to argue for upholding restraint on alienation); *Hunnicut v. Rickenbacker*, 234 S.E.2d 887, 889 (S.C. 1977). It is likely that the *Restatement's* standards will prove persuasive in South Carolina.

Similarly, in South Carolina, as in other jurisdictions, equity will not allow enforcement of unreasonable covenants, nor those contrary to public policy. See *Rhodes v. Palmetto Pathway Homes, Inc.*, 400 S.E.2d 484 (S.C. 1991) (interpreting

in defining “reasonable.”<sup>33</sup> Factors that counsel in favor of reasonableness of a restriction include:

1. the one imposing the restraint has some interest in land that she is seeking to protect;
2. the restraint has a limited duration;
3. the enforcement of the restraint accomplishes a worthwhile purpose;
4. the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained;
5. the number of persons to whom alienation is prohibited is small;
6. the restraint is imposed upon a charity.<sup>34</sup>

Factors that counsel in favor of unreasonableness include:

1. the restraint is capricious;
2. spite or malice motivate the imposition of the restraint;
3. the one imposing the restraint has no interest in the land that is benefitted by the enforcement of the restraint;
4. the restraint is unlimited in duration;
5. the restraint prohibits alienation to a large number of people.<sup>35</sup>

When weighing the “reasonable” factors, the person seeking enforcement of the covenant must show that “the restraint is of sufficient social importance to outweigh the evils which flow from interfering with the power of alienation . . . .”<sup>36</sup> A tentative draft of the *Restatement (Third) of Property* proposes a simpler, but perhaps no

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restrictive covenant limiting property to “private residential use” narrowly, to permit residential home for mentally impaired and holding enforcement would be “contrary to public policy”); *Sea Pines Plantation Co. v. Wells*, 363 S.E.2d 891 (S.C. 1987) (denying enforcement of covenant requiring approval of architectural review board, *inter alia*, as contrary to public policy); *Laguna Royale Owners Assoc. v. Danger*, 119 Cal. App. 3d 670 (1981) (refusing to enforce servitude that is arbitrary); *Vickery v. Powell*, 225 S.E.2d 856, 859 (S.C. 1976) (stating that “equity will not enforce a covenant when to do so would be to encumber the use of land, without at the same time achieving any substantial benefit to the covantee”).

33. See, e.g., RESTATEMENT (SECOND) OF TORTS § 826 (1977) (using unreasonableness as standard in nuisance cases).

34. See RESTATEMENT OF PROPERTY § 406, cmt. i (1944).

35. See *id.*; see also *Casey v. Casey*, 700 S.W.2d 46, 48 (Ark. 1985) (holding restraint unreasonable).

36. RESTATEMENT OF PROPERTY § 406, cmt. a (1944). The restraint on alienation also may be upheld if “the curtailment of the power of alienation is so slight that no social danger is involved.” *Id.*



easier to apply, test of reasonableness: it balances “the utility of the purpose served by the restraint against the harm that is likely to flow from its enforcement.”<sup>37</sup>

Applying the factors to cases helps illustrate the distinction between partial restraints that are enforceable and those that are not. Partial, direct restraints on alienation most commonly take the form of restrictions on the manner of alienation. Most of the recent cases in that area involve condominiums. Covenants requiring the permission of owners’ associations are typically upheld as reasonable in light of the need to preserve the owners’ investments,<sup>38</sup> as are restrictions on sale of property to a small class of potential purchasers, such as convicted sex offenders,<sup>39</sup> and retention of the grantor’s right to repurchase.<sup>40</sup> In other cases, such as a restriction on occupation by one family member,<sup>41</sup> oil and gas leases that give the grantor the right of consent to transfer,<sup>42</sup> and the retention of a

37. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.4, cmt. c (Tentative Draft No. 2, 1991). The comment reminds readers that enforcement has a number of costs, such as limiting the prospects for development and limiting mobility of landowners and would-be purchasers, as well as the “demoralization costs associated with subordinating the desires of current landowners to the desires of past owners, and frustrating the expectations that normally flow from land ownership.” *Id.*

38. *See, e.g., Gale v. York Ctr. Community Coop., Inc.*, 171 N.E.2d 30, 33 (Ill. 1960) (holding that “restrictions on transfer of membership are reasonably necessary to the continued existence of the co-operative association”). In *Gale*, there was no indication that the restraints would bring about injurious consequences to the public. *See id.* at 33-34. *See also* RESTATEMENT OF PROPERTY § 406, cmt. h (1944) (noting that restraint on alienation may be made without consent when it is in connection with tract of land to be produced, by development company, for residential purposes).

39. *See, e.g., Statement of Stuart Ishimaru, Counsel to Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, House of Judiciary Constitution Fair Housing Act, FEDERAL DOCUMENT CLEARING HOUSE CONGRESSIONAL TESTIMONY*, Sept. 5, 1996, available in LEXIS, Legis Library, Cngtst File (suggesting that Fair Housing Act does not prohibit covenants barring sex offenders).

40. *See Wall v. Huguenin*, 406 S.E.2d 347, 349-50 (S.C. 1991) (enforcing servitude that allowed repurchase of ancestral plantation held by family from 1780’s until debt forced sale in 1970’s, noting in particular “unique sentimental value” of land). *But see Linder v. Adcock*, 158 S.E.2d 192 (S.C. 1967) (holding repurchase contract invalid).

In *Wall*, the original owner of the plantation deeded the property to his neighbors, the Walls, after suffering personal and financial difficulties. 406 S.E.2d at 348. Contained in the contract was a repurchase option, to be exercised at a time “convenient” to the original owner. *See id.* Thirteen years after the original transfer, the children of the original owner attempted to repurchase the land. *See id.* at 349. The circuit court found a thirteen year lapse an unreasonable delay. *See id.*

41. *See Casey v. Casey*, 700 S.W.2d 46 (Ark. 1985) (holding covenant providing that land devised to son would be forfeited if son’s daughter ever owned or possessed land was unreasonable).

42. *See Shields v. Moffit*, 683 P.2d 530, 534 (Okla. 1984) (holding lease clause purporting to restrict alienation by lessee of oil and gas lease without consent of

right of first refusal to purchase a warehouse when it is not used for a specified purpose, a partial restraint is reasonable.<sup>43</sup> Restraints on the sale of property to a class of individuals are particularly suspect.<sup>44</sup>

The reader may balance for herself those factors.<sup>45</sup> We respectfully submit that a court will likely focus upon the unlimited

lessors void); *see also* Davis v. Geyer, 9 So. 2d 727, 729 (Fla. 1942) (holding covenant that grantee would not sell property until grantor approved void).

43. *See* Proctor v. Foxmeyer Drug Co., 884 S.W.2d 853 (Tex. Ct. App. 1994) (applying *Restatement (Second) Property: Donative Transfers* (1981) in analysis, court held that option allowing seller to repurchase warehouse at set price if buyer ceased using warehouse was reasonable restraint on alienation).

44. *See* 10 POWELL, *supra* note 32, § 843 at 77-28 (stating that “[w]hen the provision purports to prevent an alienation to all but a few persons it is generally found to be invalid” and citing, among others, Jackson v. Jackson, 113 S.E.2d 766 (Ga. 1960) (invalidating covenant that property will only be sold to member of grantor’s family, bearing family name, as against public policy)). Thus, when a covenant restricts sales to most potential buyers, it is usually held invalid. *See id.* This is, moreover, not a case in which the grantor tried to restrain sale to “a person who . . . is a citizen and resident of Russia.” RESTATEMENT OF PROPERTY § 406, *illus.* 20 (1944). That restriction might be upheld, even though it excluded a great number of people, because it has little practical effect. *See id.* We are, however, today in a very different position from 1944, when Richard Powell, the reporter for the *Restatement of Property* counseled that:

A promissory restraint or forfeiture restraint may be qualified so that the power of alienation can be freely exercised in favor of all persons except those who are members of some racial or social group, as for example, Bundists, Communists or Mohammedans. In states where the social conditions render desirable the exclusion of the racial or social group involved from the area in question, the restraint is . . . [reasonably appropriate] for such exclusion and the enforcement of the restraint will tend to bring about such exclusion . . . . The avoidance of unpleasant racial and social relations and the stabilization of the value of the land which results from the enforcement of the exclusion policy are regarded as outweighing the evils which normally result from a curtailment of the power of alienation.

RESTATEMENT OF PROPERTY § 406 cmt. 1 (1944). That statement was a correct assessment of the state of the law in 1944, when it was written. *See, e.g.,* Dooley v. Savannah Bank & Trust Co., 34 S.E.2d 522 (Ga. 1945) (holding covenant to restrict alienation to any person not of Caucasian race valid); Lyons v. Wallen, 133 P.2d 555 (Okla. 1942) (holding that agreement by owners of city block to never sell, lease, or give away any of lots to anyone of “African or Negro race” valid). The current edition of Professor Powell’s treatise concludes that the law has changed. 10 POWELL, *supra* note 32, § 843, at 77-32. In the case of Henry Ingram, enforcement of the covenant will not help maintain falling land prices. There is no evidence that enforcement would avoid unpleasant social relations.

45. *See* RESTATEMENT OF PROPERTY § 406, cmt. i, 2407 (1944) (listing factors in determination of reasonableness). In assessing the balance, one might find the following comments from Southern newspapers useful: “The only thing worse than fire ants are discriminatory people like you, Mr. Ingram.” Kelly A. Cahill, Editorial, *Yankee Goodness*, MORNING STAR (Wilmington, N.C.), Feb. 18, 1998, at A. “To apply the Mason-Dixon as the rule would have been ridiculous in 1865, let alone 133 years later in a highly mobile society.” Plumb, *supra* note 13, at 1E (quoting the GAZETTE). And who can forget, “[i]f malice and ignorance were brains, Mr. In-

length of the restriction, the huge class of people who are prevented from purchasing and the divisive intent behind the restriction.<sup>46</sup> Reasonable minds may differ on the question of whether the restrictions serve a "worthwhile purpose."<sup>47</sup> Applying the factors to Mr. Ingram's covenants, substantial reason exists for believing that the covenants are invalid.<sup>48</sup> A significant percentage of the country is disabled from purchasing Mr. Ingram's property for an unlimited time. The purposes behind free alienability of property demonstrate the reasons why the restraint on sale to Yankees should not be enforced. The most commonly advanced justifications for free alienability are that free alienability fosters economic growth and commercial advancement.<sup>49</sup> Closely related to those

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gram would be Einstein." Robert Winterroth, Editorial, *Dumb, But Mean*, MORNING STAR (Wilmington, N.C.), Feb. 12, 1998, at 8A. There are serious concerns about sectional tensions, which often appear as attacks on Yankees. Professor Richard N. Currant, one of the leading American historians of the Civil War era, discusses his personal struggle with such tension, beginning in the 1930's. See RICHARD N. CURRANT, *NORTHERNIZING THE SOUTH* 1-16 (1983).

46. See RESTATEMENT OF PROPERTY § 406, cmt. i, 2407 (1944) (listing these as factors to consider in reasonableness determination).

47. See *id.* (noting that each case must be thoroughly examined in light of all circumstances).

48. Even if the restriction is valid, there is the further question of the appropriate remedy. An injunction to undo a sale to a member of the Yankee race would be difficult to obtain because South Carolina courts deny injunctions upon a showing that the equities tip against the injunction. The South Carolina Supreme Court stated, in denying a request that a building violative of a restrictive covenant be removed, that "[w]here a great injury will be done to the defendant, with very little if any [benefit] to the plaintiff, the courts will deny equitable relief." *Hunnicut v. Rickenbacker*, 234 S.E.2d 887, 889 (S.C. 1977) (quoting 20 AMERICAN JURISPRUDENCE (SECOND) § 328). Many of the same factors developed against the validity of the covenant would also counsel against enforcement of the covenant in equity. The benefits from enforcement are small and the harm, interference with the marketability of the land, is great. Thus, a court might leave the holders of the dominant estate to legal damages, which pose proof problems.

49. See *Rhodes v. Palmetto Pathway Homes, Inc.*, 400 S.E.2d 484, 486 (S.C. 1991) (holding establishment of group home for no more than nine adults would not infringe on restrictive covenant prohibiting any use other than private residential use); 6 AMERICAN LAW OF PROPERTY § 26.3 (1952) (discussing social and economic objections to restraints); RESTATEMENT OF PROPERTY § 406, cmt. a (1944) (referencing rationale for disfavoring restraints on alienation). One rationale set forth is that restraint of alienation supports the purposes of the rule against perpetuities. See *id.* Introductory Note, at 2129. The reasoning is as follows:

From this view of diverse purposes served by the rule against perpetuities, it is fair to conclude that the social interest in preserving property from excessive fettering rests partly upon the necessities of maintaining a going society controlled primarily by its living members, partly upon the social desirability of facilitating the utilization of wealth, partly upon the social desirability of keeping property responsive to current exigencies of its current beneficial owners, and partly upon the competitive basis of modern society.

See *id.* at 2129-33 (discussing purposes of rules against perpetuities).

justifications is the opposition to concentration of wealth in families, which is often the result of restrictions on sale of property.<sup>50</sup>

Mr. Ingram's offer to allow Yankees to purchase the property if they take a Southern loyalty oath may offer some hope of saving the covenant from invalidation. Even with the dispensation for those Yankees willing to take the oath, a direct restraint on alienation remains, which may be invalid. That is, the oath may not sufficiently free the land from the covenant's restraint on alienation. The oath is difficult to police, which will counsel against enforcement through injunction.<sup>51</sup> The oath also smacks of a feudal oath of loyalty, which is regarded with suspicion by American law.<sup>52</sup> Finally, it is unlikely that the oath "touches and concerns" the land, which means that the covenant "affect[s] the legal relations—the advantages and the burdens—of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land."<sup>53</sup> It

50. See JOHN CHIPMAN GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* 4-6 (2d ed. 1895) (highlighting manner in which rule against perpetuities is targeted at restraints on alienation).

51. See, e.g., *Walgreen Co. v. Sara Creek Prop. Co.*, 966 F.2d 273, 279 (7th Cir. 1992) (noting that injunction may be denied when policing requires substantial court involvement). See also *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 279 (7th Cir. 1986) (noting injunctions are not granted as matter of course).

52. See, e.g., 4 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 24-25 (Oliver W. Holmes, Jr. ed., 12th ed., 1884) (noting that fealty has been "completely removed in New York"); Thomas Jefferson, *A Summary View of the Rights of British America*, in THOMAS JEFFERSON: *WRITINGS* 118-19 (Don E. Fehrenbacher ed., 1983) (arguing that lands in America are not subject to feudal incidents of crown).

53. *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793, 796 (N.Y. 1938) (citation omitted). In determining whether a covenant "touches and concerns" the land, one looks to "the effect of the covenant on the legal rights which otherwise would flow from the ownership of land and which are connected with the land." *Id.* at 796. The *Restatement of Property* provides that a covenant "touches and concerns" the land when:

- (a) the performance of the promise will benefit the promisee or other beneficiary of the promise in the physical use or enjoyment of the land possessed by him, or
- (b) the consummation of the transaction of which the promise is a part will operate to benefit and is for the benefit of the promisor in the physical use or enjoyment of land possessed by him.

RESTATEMENT OF PROPERTY § 537 (1944).

Under both the *Restatement* and *Neponsit* formulations, the benefit seems personal rather than appurtenant to the land. One might argue that the oath limits the group of people who may occupy the property; limitations on use certainly touch and concern the land. Nevertheless, the oath itself does not touch and concern the land. Alternatively, the *Restatement (Third) of Property* proposes an elimination of the touch and concern requirement. See RESTATEMENT (THIRD) OF PROPERTY: PROPERTY-SECURITY (MORTGAGE) § 3.1 (1991). In place of touch and concern, the *Restatement* counsels that a servitude is invalid if it "infringes a constitutionally protected right, contravenes a statute or governmental regulation, or

appears that the loyalty oath confers merely a personal benefit on Mr. Ingram. He has the pleasure of seeing others pay homage to him through their words and actions, but the oath itself has no connection to a particular parcel of land.<sup>54</sup> A covenant must "touch and concern" the land for it to be enforced against subsequent purchasers.<sup>55</sup> The provision that one take an oath, therefore, is unlikely to run to future purchasers.<sup>56</sup>

One factor might counsel in favor of upholding the restraint. One may argue (without much likelihood of success) that the restraint will help preserve the historic character of the plantation. As Professor Singer has observed:

[R]estrictions on alienation may serve very useful social functions . . . . Under some market conditions, alienability may actually concentrate ownership in the hands of the wealthy since [they] are able to bid higher amounts for property and may thereby induce others to sell. Restraints on alienation of low-income housing, for example, may serve to ensure continued availability to poor families.<sup>57</sup>

Conservation servitudes, for example, provide substantial benefits and justify significant restraints on alienation, as well as depart from traditional requirements of servitudes.<sup>58</sup> Mr. Ingram's restrictions

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violates public policy." *Id.* One problem with the abandonment of the touch and concern requirement is that it may subject land to additional requirements unconnected to the land. *See id.* But see Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1358-64 (1982) (criticizing touch and concern requirement because it interferes with private land use arrangements). Another criticism is that some uncertainty results from a covenant's susceptibility to a judge's interpretation of "public policy." A court will most likely conclude that the loyalty oath does not touch and concern the land, or, if it applies a reasonableness standard, that the oath is unreasonable.

54. There is no reason to suspect that the oath will affect the value of neighboring parcels, which itself suggests that the oath does not touch and concern the land. *See* ROGER A. CUNNINGHAM, WILLIAM B. STOEUBUCK, & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 8.15, at 474-75 (2d ed. 1993) (noting test for touch and concern relates to economic impact of benefit and burden).

55. *See* Harbison Community Ass'n v. Mueller, 459 S.E.2d 860, 862 (S.C. 1995) (holding that covenants that allow assessments run with land, so community association could collect assessments).

56. This observation raises a complex problem in the interpretation of the covenant. The oath might save the direct restraint on alienation, but it probably is itself invalid. Further, it poses a problem of construing different clauses in the covenant. If they are construed together, the loyalty oath may be viewed as a way of mitigating the harsh results of the direct restraint on alienation. Alternatively, the oath has no identifiable relationship to the Delta Plantation.

57. SINGER, *supra* note 27, at 573.

58. *See* RESTATEMENT (THIRD) PROPERTY: SERVITUDES, § 3.4 cmt. i (1991). *Compare* S.C. CODE ANN. § 27-9-20 (Law Co-op. 1976) (excepting conservation servi-

provide only an attenuated connection to historic preservation. There is no evidence that his prohibition of Yankees will help preserve the historic character of the plantation, nor that such blanket restrictions are closely tailored to that purpose.<sup>59</sup> There are, in short, much better ways of preserving the plantation's historic character, which would infringe significantly less on the presumption against restraints on alienation. Given Mr. Ingram's desire to develop the land commercially, it appears that the restriction serves little purpose other than drawing distinctions between people based on their state of origin, a practice frowned upon by the courts.

### III. CONSTITUTIONAL PROBLEMS WITH THE COVENANT

It has been found that differences between individuals of the same race are often greater than differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.

—Justice Byron White, *St. Francis College v. Al-Khazraji*<sup>60</sup>

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tudes in favor of government and selected environmental organizations from common law rules regarding privity and dominant estates) with GA. CODE ANN. § 44-10-3, 44-10-4 (1997) (excepting conservation servitudes from 20 year limitation that applies to other Georgia servitudes governing use). See also N.Y. ENVTL. CONSERV. LAW § 49-0305 (McKinney 1997) (abrogating common law requirements for easements when used for historic preservation).

59. When weighing reasonableness of the restriction, a court will look to the benefit from the restriction. Because the restrictions do not prevent development, Mr. Ingram can claim little benefit. See *supra* notes 33-34, 45-56 and accompanying text (describing balancing of reasonableness factors). Conversely, the broad prohibition causes significant losses. Thus, there is a need to tailor the covenant narrowly to achieve the legitimate goal of historic preservation without incurring the disadvantages of spite and restraint on purchase.

It is unlikely that Mr. Ingram could retain the power to approve subsequent purchasers of the land. See *Northwest Real Estate Co. v. Serio*, 144 A. 245, 247 (Md. 1929) (holding that provision that land not be sold or rented without consent of grantor was void because it was in conflict with public policy). *A fortiori*, Mr. Ingram ought not to be able to institute a blanket prohibition on "Yankee" purchasers that is only tangentially tied to the preservation of the community and the plantation's history.

60. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610 (1987) (citations omitted). In *St. Francis College*, the issue before the court was "whether a person of Arabian ancestry was protected from racial discrimination under § 1981." *Id.* at 607. The court concluded that a person of Arabian ancestry was protected even though the person was a member of the Caucasian race. See *id.* The court held that Congress, in enacting section 1981, intended to protect classes of persons who are subject to discrimination based on their ethnic or ancestral background, not only broad categories of Caucasian, Negro, and Mongoloid. See *id.* at 613. There-

They gaily dance the steps their African Slaves teach them, whilst pretending to an aristocracy they seem only to've heard rumors of . . . . No good can come of such dangerous Boobyism. What sort of Politics may proceed herefrom, only He that sows the Seeds of Folly in His World may say.

—Rev. Wicks Cherrycoke, *Spiritual Day-Book*<sup>61</sup>

Even though Mr. Ingram's restriction is a private contractual agreement, its enforcement by the judicial system would be subject to scrutiny under the U.S. Constitution. As long established by *Shelley v. Kraemer*,<sup>62</sup> judicial action to enforce restrictive covenants bears the clear and unmistakable imprimatur of the State.<sup>63</sup> Should Mr. Ingram or his successors-in-interest attempt to enforce the terms of the Yankee covenant in state or federal court, the restriction would undoubtedly be struck down as violating Section One of the Fourteenth Amendment, which states:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>64</sup>

The covenant's exclusion of "members of the Yankee race" from purchasing Mr. Ingram's plantation is unconstitutional as an imper-

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fore, the court did not dismiss the action because the parties were both Caucasian, recognizing that discrimination was possible in this case. *See id.* at 605.

61. THOMAS PYNCHON, MASON & DIXON 275 (1997) (reprinting excerpt from Reverend Wicks Cherrycoke, *Spiritual Day-Book*).

62. 334 U.S. 1 (1947). *Shelley* was a combination of two cases involving racial discriminatory restrictive covenants. *See id.* at 4-8. These covenants were made between two private individuals. *See id.* There was no state action involved until the covenants were judicially enforced. *See id.* The issue before the court was whether judicial enforcement constituted state action. *See id.* at 8. It concluded that "from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials." *Id.* at 18. Therefore, the Court's enforcement of the restrictive covenants would constitute state action and thus violate the Fourteenth Amendment. *See id.* at 20. It is important to note that the restrictive covenants alone do not violate the Fourteenth Amendment because there is no state action. *See id.* at 13. Individuals are thus free to draft such covenants. *See id.* They cannot, however, enforce these covenants judicially. *See id.* A court's abstinence of enforcement of restrictive covenants also would not constitute state action. *See id.* at 19.

63. *See id.* at 20.

64. U.S. CONST. amend. XIV, § 1.

missible racial classification and as an impediment to the constitutional right to travel under the Equal Protection Clause of the Fourteenth Amendment.<sup>65</sup> Each of these constitutional claims are addressed after a discussion of whether judicial enforcement of Ingram's covenants would constitute state action.

#### A. State Action?

In *Shelley*, an opinion signed onto by six justices (three justices did not participate in the decision), Justice Vinson clearly stated "that the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this court."<sup>66</sup> This proposition, which defined state action, was supported by the citation of various cases including those establishing the removal jurisdiction of federal courts,<sup>67</sup> striking down racial bars to jury participation,<sup>68</sup> and

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65. See *id.* For discussion on the Equal Protection Clause's invalidation of restrictive covenants, see *infra* notes 113-28 and accompanying text.

66. *Shelley*, 334 U.S. at 14. Six Justices signed onto this opinion and Mr. Justice Reed, Mr. Justice Jackson, and Mr. Justice Rutledge took no part in the decision of this case. For a discussion of *Shelley*, see *supra* note 62.

67. See *Shelley*, 334 U.S. at 14 (citing *Virginia v. Rives*, 100 U.S. 313 (1880)). In *Rives*, the Court examined whether the removal of cases to federal court was a protection mechanism afforded to citizens under the Fourteenth Amendment. 100 U.S. at 318. Two black men charged with murder argued that the Equal Protection Clause guaranteed them a jury that was in part comprised of black men. See *id.* at 315. The Court examined the Fourteenth Amendment and concluded that it guarantees that "all person within the jurisdiction of the United States shall have the same right in every State and Territory." *Id.* at 317. The Court did not read this as mandating that a certain jury be composed of a certain race. See *id.* at 323. The Court denied the removal of the case because the Fourteenth Amendment does not guarantee a right to have the jury composed of a particular race. See *id.* The Court reasoned that a mixed jury is not essential to the equal protection of the laws. See *id.*

68. *Shelley*, 334 U.S. at 16 (citing *Strauder v. West Virginia*, 100 U.S. 303 (1879)). In *Strauder*, the Court examined whether a state statute that forbids colored men from participating in juries denies a colored defendant full and equal benefit of all laws and proceedings in the state. 100 U.S. at 305. The Court held that the state statute was unconstitutional because the state was denying the individual equal protection of the law. See *id.* at 308. The Court's rationale was based on the assumption that every citizen is guaranteed a trial by jury and having a jury constituted of peers and equals is essential to this right. See *id.* Furthermore, the Court has always forbidden prejudiced jurors. See *id.* at 309. The Court's restriction of packing the jury illustrates this point. See *id.*

The Court stated that:

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of right and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or



numerous cases recognizing due process violations in judicial proceedings.<sup>69</sup> Under this broad reading of what constitutes state action, judicial enforcement of Ingram's restrictive covenant would almost certainly constitute state action.

The broad reach of *Shelley*, however, has been narrowed by subsequent case law in ways which may make the finding of state action, even in the area of restrictive covenants, far from certain. The Court has held that *Shelley* does not apply to the judicial enforcement of certain defeasible fees.<sup>70</sup> Furthermore, in a series of cases

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property. Any state action that denies this immunity to a colored man is in conflict with the Constitution.

*Id.* at 310. Therefore, any state action that denies equal protection of the law is unconstitutional. *See id.*

69. *See Shelley*, 334 U.S. at 16 (citing *Frank v. Magnum*, 237 U.S. 309 (1915)). In *Frank*, the court determined whether a defendant was deprived of due process of law. 237 U.S. at 325. The defendant claimed that his involuntary absence from the courtroom during the jury's rendering of the verdict deprived him of an essential part of his right to trial by jury and thus amounted to a denial of due process of law. *See id.* at 315. The court concluded that the "Due Process Clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with." *Id.* at 340. Therefore, in this case, the defendant's absence during the rendering of the verdict did not deprive him of the due process of law. *See id.* at 339; *see also*, *Twining v. New Jersey*, 211 U.S. 78 (1908) (determining whether state statute violated due process of law).

In *Twining*, the jury was instructed that they may draw an unfavorable inference against the defendant for his failure to testify. 211 U.S. 78, 90 (1908). The court concluded that this was not a violation of the Fourteenth Amendment because the right not to testify as granted by the states is not one that is afforded by the Constitution. *See id.* at 114. The court overturned this holding in *Malloy v. Hogan*. *See* 378 U.S. 1, 5 (1964) (holding that Fifth Amendment's exception from testifying against oneself is protected by Fourteenth Amendment). The court expressly rejected *Twining*. *See id.* In *Malloy*, the court was looking at whether imprisonment for refusing to testify was a violation of the Fourteenth Amendment. *See id.* at 5, 8. The court concluded it was because this was another coercive technique to prompt the accused to admit to the crime. *See id.*

70. *See Evans v. Abney*, 396 U.S. 435 (1970) (holding that restriction on trust property to be used as park allowing use "for white people only" was purely private discrimination and thus was enforceable). In *Evans*, the state court held that the restriction was not possible to fulfill under common law and reverted the property to the settler's heirs. *See id.* at 436 (citing *Evans v. Newton*, 165 S.E.2d 160 (Ga. 1968)). The Supreme Court found no state action because the court's ruling was based on neutral state laws and on the administration of a fee simple determinable, which reverts title automatically to the grantor upon failure of the condition. *See id.* at 439; *see also* *Charlotte Park & Recreation Comm'n. v. Barringer*, 88 S.E.2d 114 (N.C. 1955) (holding that enforcement of fee simple determinable was not state action). *Cf. Hermitage Methodist Homes of Va. v. Dominion Trust Co.*, 387 S.E.2d 740 (Va. 1990) (suggesting that judicial enforcement of fee simple subject to condition subsequent would constitute state action while enforcement of fee simple determinable would not).

Lower courts have held that enforcement of racial restrictions in a will was not state action. *See, e.g., Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1955). Further,

arising from constitutional challenges to the arrest of sit-in protesters in the Sixties, the Court grappled with the reach of the *Shelley* decision, specifically addressing judicial enforcement of common law and statutory trespass law.<sup>71</sup> The sit-in cases involved arrests of African-American protestors under neutral trespass laws designed to protect the property owner's right to exclude.<sup>72</sup> As in *Shelley*, the issue was the use of the judiciary to enforce private rights in a manner that was discriminatory both in effect and in intent.<sup>73</sup> Did *Shelley*'s holding that judicial enforcement of contracts constituted state action extend to judicial enforcement of rights under tort law? The answer given by the Court was a resounding "maybe." The early cases sidestepped the *Shelley* issue, finding state action either in statutory law or practice of the police officers who arrested the protesters.<sup>74</sup> In *Bell v. Maryland*,<sup>75</sup> the Court divided three ways, with the plurality opinion written by Justice Brennan ignoring *Shelley* entirely and overturning the conviction of the African-American protestors

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the Supreme Court concluded that a will establishing a trust administered in part by state officials to enforce racial restrictions constitutes state action. See *Pennsylvania v. Board of Dir. of Trusts*, 353 U.S. 230 (1957). Interestingly, the lower court found unconstitutional state action even after private individuals replaced state officials. See *Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir. 1968).

71. See, e.g., *Bell v. Maryland*, 378 U.S. 226 (1964) (Douglas, J., concurring); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *Peterson v. City of Greenville*, 373 U.S. 244 (1963) (all exploring limits of *Shelley* decision in civil rights context).

72. See *Bell*, 378 U.S. at 228-29; *Lombard*, 373 U.S. at 269; *Peterson*, 373 U.S. at 245-46.

73. See, e.g., *Bell*, 378 U.S. at 242-60 (discussing throughout concurring opinion role of *Shelley* in determining enforcement of private rights and potential discriminatory effects associated with enforcement of private rights).

74. See *Peterson*, 373 U.S., at 244 (holding that state statute constituted state action); *Lombard*, 373 U.S., at 267 (holding that police officers' arrest of protestors constituted state action). In *Peterson*, 10 African-Americans were found in violation of a state trespass statute. 373 U.S. at 245. The city argued that there was no state action because the manager, not a city employee, removed the boys from the premises. See *id.* at 247. The court stated:

When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforced the discrimination mandates by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.

*Id.* at 248. The court followed these principles in *Lombard*. 373 U.S. at 268. In this case, however, the court found state action not in any statute that forbade African-Americans at a lunch counter, but in the policy of the police that they would not tolerate any desegregation service restraints. See *id.* at 273. This policy was held to be state action even though they were not laws of the state. See *id.* The court held that a "state or a city, may act as authoritatively through its executive, as through its legislative body." *Id.*

75. 378 U.S. 226 (1964) (Douglas, J., concurring; Black, J. dissenting).

on procedural grounds.<sup>76</sup> Justice Douglas and the two other justices in concurrence also ruled to overturn the convictions on the grounds that their conviction under state trespass law constituted state action in violation of the Fourteenth Amendment Equal Protection Clause.<sup>77</sup> In dissent, Justice Black and two other justices voted to stay the convictions on the grounds that conviction under neutral state trespass law did not constitute state action.<sup>78</sup> Justice Black urged cabining *Shelley* only to cases where racial discrimination was involved and said that application of state law would impede a transaction between a willing seller and a willing buyer.<sup>79</sup>

Since *Bell*, the Court has not addressed the extent of the *Shelley* decision in constitutionalizing causes of action grounded in neutral

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76. See *id.* at 226 (Brennan, J., per curiam). The Court did not address the Fourteenth Amendment issue because after the convictions, the state legislature enacted a law that made it illegal for any public accommodation to discriminate based on race, creed, color, or national origin. See *id.* at 228-29. Although appellate courts normally consider the appropriateness of the judgment under the laws in existence at the time of the judgment, a judgment must be vacated and reversed when a supervening change in the governing law occurs after the judgment of the trial court and prior to the decision of the appellate court. See *id.* at 228. The Court then must consider the effect of the change in law. See *id.* at 231. Here, the Court remanded the case to state court for a determination of whether these convictions should be upheld under a state savings clause. See *id.* at 241.

77. See *id.* at 255-60. Justice Douglas suggested that the Court attempted to avoid the constitutional question raised by this case when it remanded the case for reconsideration in light of the change in state law. See *id.* at 243. Douglas went on to consider the constitutional question. The Court found that "[s]tate judicial action is as clearly 'state' action as state administrative action." *Id.* at 255. Segregation of African-Americans in restaurants and lunch counters violates the Equal Protection Clause of the Fourteenth Amendment. See *id.* at 260. Douglas reached this conclusion through an analysis of the Court's reasoning in *Shelley* and by considering state action "in light of the degree to which a State has participated in depriving a person of a right." *Id.* at 257. Douglas also held that a restaurant owner's failure to serve an African-American was a violation of the individual's Fourteenth Amendment, basing his decision on the holding in *Shelley*. See *id.* at 255, 260. For a discussion of *Shelley*, see *supra* notes 62, 66-74 and accompanying text.

78. See *Bell*, 378 U.S. at 318. Justice Black addressed the constitutional issue and interpreted the Fourteenth Amendment to prohibit certain conduct on the part of the State, not private actors. See *id.* at 326. He concluded that petitioner relied on *Shelley* misguidedly. See *id.* at 327-28. Black interpreted *Shelley*'s holding as finding that "state enforcement of the covenants had the effect of denying to parties their federally guaranteed right to own, occupy, enjoy and use their property without regard to race or color." *Id.* at 330. Judicial enforcement of trespass law failed to qualify as state action under Black's interpretation. See *id.* at 332.

79. See *id.* at 331-32. Justice Black stated that a "property owner may, in the absence of a valid statute forbidding it, sell his property to whom he please and admit to that property whom he will; so long as both parties are willing parties." *Id.* at 331. Black was unwilling to reach the conclusion that mere judicial enforcement of the trespass law is enough to constitute state action. See *id.* at 332.

state and common law.<sup>80</sup> Recently, in reviewing its state action jurisprudence, the Court held that state action under *Shelley* exists when "the injury caused is aggravated in a unique way by the incidents of governmental authority."<sup>81</sup> Given *Shelley*'s patched history, "unique" likely means "the very specific facts of *Shelley v. Kraemer*." The Court's treatment of *Shelley* makes it clear that it does not stand for the proposition that all judicial enforcement of private discriminatory conduct constitutes state action for Fourteenth Amendment purposes. It is unclear, however, what the exact limits are in applying *Shelley*.

Lower court interpretations of *Shelley* have placed equally vague limits on its holding. Many courts, for example, have limited the application of *Shelley* to the judicial enforcement of restrictive covenants. In *Ireland v. Bible Baptist Church*,<sup>82</sup> the Texas Court of Civil Appeals failed to find state action in the judicial enforcement of a covenant restricting buildings to single-family residences.<sup>83</sup> This covenant was challenged by a church as a violation of the Free Exercise Clause of the First Amendment.<sup>84</sup> The court disagreed, distinguishing *Shelley* from the instant case, asserting that *Shelley* applied to discrimination based on race or color.<sup>85</sup> In contrast, "[t]he

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80. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (concluding that respondents failed to sustain claim under the "hindrance" clause of section 1985(3)). Justice Scalia, author of the majority opinion, contended that no legal warrant exists for the physical occupation of private property without consent of the owner. See *id.* at 282 n.14. Justice Scalia criticized Justice Souter's reliance on *Shelley* stating: "[a]ny argument driven to reliance upon an extension [of] that volatile case is obviously in serious trouble." *Id.*

81. *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 622 (1990). In *Edmondson*, the Court considered whether a private litigant must be deemed a governmental actor in the use of peremptory challenges. See *id.* at 621. The Court also highlighted several factors to consider when determining whether an actor is governmental in character: "the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way by the incidents of governmental authority." *Id.* at 621-22. The Court concluded that the exercise of peremptory challenges by the defendant in District Court constituted state action because peremptory challenges, as part of the jury trial system, could not exist without the "overt, significant assistance of state officials." *Id.* at 622 (citations omitted).

82. 480 S.W.2d 467 (Tex. Ct. App. 1972).

83. See *id.* at 470.

84. See *id.* The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

85. *Ireland*, 480 S.W.2d at 470. The court highlighted that the restrictions in *Shelley* differ from those in the instant case because judicial enforcement of such covenants "constituted 'discriminatory action on the part of the States based on considerations of race or color.'" *Id.* In this case, judicially enforced restrictions applied not only to Baptist churches, but to churches of all denominations. See *id.*

single-family residence] restriction which was enforced in the instant case applied equally to churches of all denominations and faiths. If the restriction applied only to Baptist churches while permitting those of other denominations, the rationale of *Shelley* would be more persuasive.”<sup>86</sup> The court’s reasoning pertains to the constitutionality of the restriction as opposed to the existence of state action. What the court seems to be implying is that enforcement of a restrictive covenant entails state action when the restriction is racially discriminatory. As evidenced in *Ginsburg v. Yeshiva of Far Rockaway*, at least one court has followed this interpretation of the *Ireland* decision by also refusing to apply *Shelley* to a residential restriction because “the covenants considered in *Shelley* were racially discriminatory on their face.”<sup>87</sup>

The *Ireland* case and its progeny offer tenuous guidelines in limiting *Shelley* in the context of restrictive covenants.<sup>88</sup> As suggested above, it is not entirely clear what limits these minority courts have placed on *Shelley* in the context of restrictive covenants. Given the vagueness of their reasoning, cases like *Ireland* and *Ginsburg* can best be understood as holding that assuming judicial enforcement of the covenant constitutes state action, the covenant is not unconstitutional.

Furthermore, several courts have extended *Shelley* to apply to the enforcement of covenants that are not racially discriminatory on their face but instead place restrictions on use and size. In *West*

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86. *Id.*

87. *Ginsburg v. Yeshiva of Far Rockaway*, 358 N.Y.S.2d 477, 482 (N.Y. App. Div. 1974). The parties sought to enjoin the operation of a religious school on property that was subject to a restrictive covenant. *See id.* at 479. The court considered “whether there is a violation of the constitutional guarantees of religious freedom by the enforcement of the covenant against the defendant, which was purchased with knowledge of the covenant and of the plaintiff’s intention to enforce it.” *Id.* The court distinguished between zoning and restrictive covenants as well. *See id.* at 482. Unlike zoning, which requires “justification of an overriding public interest” to enforce an encroachment on property rights, a covenant is a property right and its enforcement does not require an overriding public interest. *Id.* Thus, the court enforced the operation of the school. *See id.* at 483.

88. Many courts have placed limits on *Shelley* in the context of Free Exercise claims. *See supra* notes 70-79 and accompanying text. Again, it is not clear whether these cases addressed the state action issue or the constitutionality of the underlying covenant. As the text suggests, given the uncertainty, the opinions assume state action and base a finding of constitutionality on that assumption. *See POWELL, REAL PROPERTY, supra* note 32, § 60.06[3] nn.78, 79. The reasoning of *Shelley* has also been applied outside the covenant context to the judicial resolution of intra-church disputes. *See Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190 (1959) (reversing decision of New York Court of Appeals in settling religious dispute because decision conflicted with Free Exercise Clause). For a full discussion of this issue, see JOHN T. NOONAN, *THE LUSTRE OF OUR COUNTRY* 229 (1998).

*Hill Baptist Church v. Abbate*,<sup>89</sup> an Ohio court ruled that judicial enforcement of a use restriction against a church would constitute state action in violation of the Free Exercise Clause.<sup>90</sup> The court's principal authority was the following language from a law review article: "a restriction of the free exercise of religion might be regarded as sufficiently analogous to the situation involved in *Shelley v. Kraemer* to justify characterizing the enforcement of the restrictive covenant as invalid state action."<sup>91</sup> The court ruled that as applied to the church, the covenant was a violation of the First Amendment because the terms of the restriction bore "no reasonable relationship to the public health, safety, morals and general welfare."<sup>92</sup>

Other courts have similarly found state action in the enforcement of restrictive covenants. In *Riley v. Stoves*,<sup>93</sup> an Arizona court held that enforcement of a covenant placing age restrictions on residents constituted state action but upheld the restriction as not vio-

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89. 261 N.E.2d 196 (Ohio 1969). Individuals seeking to build churches on their property challenged two restrictive covenants limiting the property to single family residential land. *See id.* at 197-98. The court differentiated between zoning and restrictive covenants. *See id.* at 200. Zoning "is the exercise of police power regulating and controlling the uses of real property." *Id.* Restrictive covenants "purport to control the use of real property [and] are in the nature of private zoning or zoning by contract." *Id.* The court points out that restrictive covenants do not supercede zoning ordinances, nor do zoning ordinances affect the validity of a restrictive covenant. *See id.* The court continues "that if a zoning ordinance is in its operation, unconstitutional, a restrictive covenant in the same area having the same effect would likewise be unconstitutional." *Id.*

90. *See id.* at 202. For the language of the Free Exercise Clause, see *supra* note 84. The court concluded that if the covenants involved had been zoning ordinances, not restrictive covenants, they would be unconstitutional when applied to churches and synagogues. *See West Hill*, 261 N.E.2d at 202. The court faced the question whether the result should differ with restrictive covenants produced by private agreement. *See id.* at 201. In reaching its conclusion, the court relied on *Shelley*, finding its rationale applied here. *See id.* This court decided that it would be engaging in state action if it enforced the restrictive covenants in this case, thus violating the Free Exercise Clause of the First Amendment. *See id.* at 200, 202. The court, therefore, found these restrictions unenforceable. *See id.*

91. *Id.* at 201 (quoting Note, *Churches and Zoning*, 70 HARV. L. REV. 1428, 1438 (1957)). For a discussion of the Court's application of *Shelley*, see *supra* notes 70-81 and accompanying text.

92. *West Hill*, 261 N.E.2d at 201. Substantive due process required the court to find these covenants unconstitutional, because a parallel zoning law that excluded churches would be unconstitutional. *See id.* at 201. These private covenants result in "unreasonable regulation of 'time and place' for the exercise of religion by those coming into the area affected by the restrictions." *Id.* The court conceded that if the benefit the covenant provided to the public outweighed the small effect on freedom of religion, the public involved would prevail. *See id.* Here, however, private not public interests were concerned and the balancing of these factors weigh in favor of freedom of religion. *See id.* at 202.

93. *Riley v. Stoves*, 526 P.2d 747 (Ariz. Ct. App. 1974).

lating the constitution.<sup>94</sup> In *Franklin v. White Egret Condominium, Inc.*,<sup>95</sup> a Florida court, deciding a petition for rehearing, held that state court action was involved in the judicial enforcement of a single family residence restriction.<sup>96</sup> The Florida court stated that “the actions of state courts and of judicial officers performing in their official capacities have long been regarded as state action”<sup>97</sup> and that “other fundamental interests which fall within the penumbra of constitutional protection may also be infringed to varying degrees by the restrictive covenant,” meaning that covenants can be subjected to constitutional scrutiny based on fundamental rights other than freedom from race based discrimination.<sup>98</sup>

It is true that the outer limits of *Shelley* remain unclear. No legal commentator would conclude that *Shelley* means that all private causes of action raise constitutional issues.<sup>99</sup> On the other hand, *Shelley* has never been overruled. Despite some confusion cast by lower courts, *Shelley* does apply to its facts: judicial enforcement of a restrictive covenant constitutes state action.<sup>100</sup> Thus, it will be difficult for defenders of Ingram’s restrictions to escape con-

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94. See *id.* at 751. This court, relying on *Shelley*, held that enforcement of a restrictive covenant constituted state action. See *id.* The court enforced the covenant because enforcement did not violate any constitutional right. See *id.* at 753. Even discriminatory state action will not be held to violate the Equal Protection Clause where the “classification bears some rational relationship to a permissive state objective.” *Id.* at 752. The court considered the legitimate purpose that the age restriction served and whether the restriction was a reasonable means of achieving the stated objective, given its effect upon the defendants. See *id.* The court concluded that the age restriction was reasonable to accomplish the end of providing a residential establishment for retired and working individuals. See *id.*

95. 358 So. 2d 1084 (Fla. Dist. Ct. App. 1978).

96. See *id.* The Fourteenth Amendment prevents discrimination where there is state action, but it does not provide for a cause of action against private conduct, no matter how discriminatory. See *id.* at 1089.

97. *Id.* at 1088-89. The court considered state action a broad concept. See *id.* at 1088. In seeking the power of the court to compel a reconveyance of the interest in the condominium, the plaintiff invoked the state’s sovereign powers to legitimize the restrictive covenant at issue. See *id.* at 1089. Therefore, the court owed a duty to carefully scrutinize the covenant to determine whether it passed constitutional muster. See *id.*

98. *Id.* at 1089. Covenants can be subject to constitutional scrutiny based on fundamental rights other than freedom from racial discrimination. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (discussing interest concerning family living arrangements); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (discussing interest parents have in being able to supervise their children’s education); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (determining interest which supports free and open travel among states).

99. See generally GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 938 (13th ed. 1997) (rejecting broad application of *Shelley* since “some seemingly ‘neutral’ state nexus with private actor can almost always be found . . .”).

100. See *Shelley*, 334 U.S. at 20. For a general discussion of *Shelley*, see *supra* note 62 and accompanying text.

stitutional scrutiny by characterizing the covenant as a purely private action. Is Ingram's restriction violative of the Constitution? The answer rests on what Ingram means by "Yankee race." We offer our interpretation below.

## B. Improper Racial Classification?

The original purpose of the Fourteenth Amendment was to protect African-Americans from persecution they faced by the government pre-Emancipation.<sup>101</sup> It may seem a stretch of history and reason to extend these same protections to the "Yankee race," regardless of how such a group is to be defined. Of course, such extensions would be perfectly consistent with a color-blind interpretation of the Constitution, a view largely adopted in many recent cases involving the constitutionality of remedial affirmative action programs.<sup>102</sup> Consistent with this line of cases may be the view that "white race" is a suspect classification only in the context of remedial actions, but not otherwise. This conclusion would be erroneous, inconsistent not only with a color-blind philosophy, but also with the language of *Shelley*. In dicta, the *Shelley* court addressed the homeowner's argument that the racially restrictive covenants did not violate the Equal Protection Clause<sup>103</sup> because the covenants could be drafted just as easily to restrict whites as to restrict blacks. The Court stated:

The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal

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101. See generally, GUNTHER & SULLIVAN, *supra* note 99, at 629 (discussing meaning of equal protection as drawn from its historical origins).

102. See generally *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (both exploring constitutionality of affirmative action programs). The "color-blind" view of the Constitution has its roots in Justice Harlan's famous dissent in *Plessy v. Ferguson*: "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. 539, 559 (1896). What "color-blindness" means is, of course, a matter of dispute, especially if the default is white, capitalist culture. See generally ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992) (tracing development of color-blind principle in U.S. political and constitutional history and arguing against use of racial classifications for any purpose, including remedial); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (arguing that color-blind principle is antithetical to cultural and racial pluralism).

103. See U.S. CONST. amend. XIV, § 1. For the language of the Equal Protection Clause, see *supra* text accompanying note 64.



protection of the laws is not achieved through indiscriminate imposition of inequalities.<sup>104</sup>

The language suggests that any restriction based on race or color would be unconstitutional under *Shelley* whether the restriction ran against whites or African-Americans.

The more difficult question is identifying when a restriction is racial. "Yankee race" is not a conventional racial category; it is one that encompasses whites, blacks, Asians, Hispanics, and Native Americans if a member of such a group was born north of the Mason-Dixon line or lived there for more than a year. The category is not a blanket restriction against a racial or ethnic group but more appropriately a distinction within groups. African-Americans born south of the Mason-Dixon line who had never ventured North for more than a year could purchase Mr. Ingram's property, as could Hispanics, Native Americans, and Asians. Despite Mr. Ingram's use of the word "race," the covenant may truly be color-blind and not a restriction based on race or color that would be unconstitutional under *Shelley*.

What is troubling about the restriction is the use of the word "race." The "r-word" in this context reeks of animus towards non- or faux- Southerners, animus fertilized by memories of the heated War of Northern Aggression and nostalgia for the genteel southern plantation culture (albeit memories and nostalgia not derived in Mr. Ingram's case from any actual experience). Classifications which are racial on their face are subject to strict scrutiny, while classifications that have a disparate racial impact receive strict scrutiny upon a showing of discriminatory intent.<sup>105</sup> Although the Supreme Court distinguishes between laws that entail facial classifications and those that are facially neutral but discriminatory in effect, it is not completely clear what a facial classification means. Does the use of the word "race" alone place a law in the facial classification category? This solution would lead to the absurd conclusion that covenants which made restrictions based on the "left handed race" or "the race of old people" would subject the covenant to strict scrutiny when the classification itself involves a non-suspect category.

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104. *Shelley*, 334 U.S. at 22 (footnote omitted).

105. See GUNTHER & SULLIVAN, *supra* note 99, at 662-70 (describing and analyzing suspect classifications based on race and associated problems with discrimination). Racial classifications are ordinarily "suspect." See *id.* at 662. Disadvantaging racial classifications are ordinarily "suspect," subjected to "the most rigid scrutiny," and bear a "very happy burden of justification." *Id.* at 670.

Does the use of the word "Yankee" cure the discriminatory animus associated with the use of the word "race?" Not in light of the cultural background to Ingram's restriction: anger and hostility festering since the Civil War over the loss of the right to treat certain groups as inferior and subordinate. As the Supreme Court held in construing the meaning of "race" under Section 1981 of the Civil Rights Act of 1991,<sup>106</sup> racial discrimination means at the least discrimination against "an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens.'"<sup>107</sup> By "Yankee," Mr. Ingram means something very specific; realistically, the classification's meaning comes not from the potential purchaser's state of origin but his state of mind, as molded by cultural attitudes that are antithetical to Mr. Ingram's state of mind.

Professor Neil Gotanda has catalogued three distinct ways in which the Court discusses race in its jurisprudence: (1) status-race; (2) formal-race; and (3) historical-race.<sup>108</sup> Each of these types are exemplified by Mr. Ingram's use of the phrase "Yankee race." Status-race rests on the fundamental belief that certain racial groups are inherently inferior.<sup>109</sup> This interpretation of the Yankee race is supported by John Daniel's 1863 editorial excerpted at the start of this Article.<sup>110</sup> "Yankees" to a Southerner like Mr. Ingram means

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106. Civil Rights Act of 1991, 42 U.S.C. § 1981 (West 1994). Providing for equality under the law, the statute states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, to give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

*Id.*

107. *St. Francis College v. Al-Khazraki*, 481 U.S. 604, 613 (1987). The history of section 1981 suggests that Congress aimed to protect identifiable classes of persons "who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics" from racial discrimination. *Id.* The Court clarified, "a distinctive physiognomy is not essential to qualify for section 1981 protection." *Id.*

108. See Gotanda, *supra* note 102, at 37-40. Under the status-race approach, racial segregation by statute or custom reflects a "common sense" understanding of the "natural" racial hierarchy. See *id.* at 38. In contrast, the formal-race approach assumes "equal protection of the law" based on common "citizenship." See *id.* The historical-race approach advocates the use of historical content of race in judicial review of race-based legislation. See *id.* at 39.

109. See *id.* at 37. At the time of the founding of the Republic, "the 'Negro African race' had been 'regarded as beings . . . so far inferior, that they had no rights which the white man was bound to respect.'" *Id.* (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857)). The court's modern approach tolerates the existence of status-race in private actors only. See *id.*

110. See generally Daniel, *supra* note 1.

cowards, thieves, vermins: creatures to be subjugated and tamed by Christian tolerance. "Yankee race" also evokes a formal race category, a seemingly neutral category, like quadroon or poltroon, that is based not on any notion of hierarchy but on a need to categorize individuals in neutral and administratively helpful ways. Formal race, as Professor Gotanda demonstrates, is the basis for separate but equal, a categorization upheld by the *Plessey* court and one made suspect by *Brown*.<sup>111</sup> If viewed as a formal-race category, "Yankee race" is emptied of its third connotation as a historical-race category. Again, as Daniel's editorial demonstrates, the historical baggage surrounding the term Yankee is one of inferiority and difference based on place of birth. It is not a stretch and is fully consonant with the original purpose of the Fourteenth Amendment to consider "Yankee race" a suspect classification for equal protection purposes.<sup>112</sup>

With this background, the restriction against the "Yankee" race should be as suspect as laws against miscegenation, struck down in *Loving v. Virginia*.<sup>113</sup> Even though the statute at issue in *Loving* applied equally to whites and African-Americans, as Ingram's covenant does, the Court found that laws preventing cross-racial intercourse and marriage violated the Equal Protection Clause<sup>114</sup> because "[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race."<sup>115</sup> By race, the Court did not mean black or white alone, but distinctions based on cultural or ethnic identity.<sup>116</sup> Equal protec-

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111. See Gotanda, *supra* note 102, at 38 (discussing *Plessey* Court's "separate but equal" classification scheme between blacks and whites in public carrier transportation).

112. For a discussion of the purpose behind the Fourteenth Amendment, see *supra* note 101 and accompanying text. For a discussion of culture-race, see Gotanda, *supra* note 102, at 56-59 (discussing how court ignored culture-race, which is important curative to dangers of color-blindness). Given the cultural basis for Ingram's animosity to those from north of the Mason-Dixon line "Yankee" race also fits into the culture-race category. See *id.*

113. 388 U.S. 1 (1967). In *Loving*, an African-American woman and a white man, both residents of Virginia, were married in the District of Columbia. See *id.* at 2. Shortly after the marriage, the couple returned to Virginia. See *id.* Three months later, the couple was charged with violating Virginia's ban on interracial marriages. See *id.* at 2-3. The Lovings thereafter instituted an action charging Virginia's antimiscegenation statutes as unconstitutional. See *id.* at 3.

114. See U.S. CONST. amend. XIV, § 1. For the language of the Equal Protection Clause, see *supra* text accompanying note 64.

115. *Loving*, 388 U.S. at 11.

116. See *id.* The Court noted its constant repudiation of distinctions made between individuals based only on their ancestry as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

tion does not mean that African-Americans and whites can be equally mistreated under the law; the rainbow coalition cannot revel in their common bond of burdensome laws based on racial stereotypes and caricatures.<sup>117</sup> Even if Mr. Ingram's restriction prevents African-Americans and whites equally from purchasing the plantation, the restriction's own terms by reference to the unconventional but clearly understood category of the "Yankee race," reflects racial and cultural stereotypes and therefore is violative of the Equal Protection Clause.<sup>118</sup>

The restriction is suspect under a disparate impact theory of the Equal Protection Clause as well.<sup>119</sup> Under *Washington v. Davis*,<sup>120</sup> non-facially discriminatory laws are unconstitutional if there is evidence of discriminatory intent.<sup>121</sup> Even if Mr. Ingram's use of the phrase "Yankee race" does not place the covenant in the facially discriminatory category, the covenant could have a disparate impact on African-Americans largely because of recent migration patterns to the South.<sup>122</sup> There has been an exodus back to the South of African-Americans during the Nineties.<sup>123</sup> The exodus is in response to boom economies in cities like Atlanta that have spilled over into neighboring localities. The return migration is also moti-

117. See *Loving*, 388 U.S. at 8 (rejecting notion that " 'equal application of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination . . . .' ").

118. For a discussion of racial and cultural discrimination, see *supra* notes 101-12 and accompanying text.

119. See U.S. CONST. amend. XIV, § 1.

120. 426 U.S. 229 (1976).

121. See *id.* at 241. In dicta, the *Washington* Court discussed a law's disproportionate impact and stated that a discriminating racial purpose need not be expressed on the face of the statute for it to be unconstitutional. See *id.* Moreover, "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

122. See *Morning Edition: Black Migration* (NPR radio broadcast, Jan. 30, 1998). Record number of black Americans are migrating South from other parts of the United States . . . . [S]ixty-five percent of the nation's black population growth between 1990 and 1996 occurred in the South. Southern cities such as Atlanta, Houston, Miami, Dallas, and Ft. Worth, are experiencing much of that growth. A strong economy in the South is a major factor in this population shift.

*Id.* As demographer William Frey reported: "the major donor states are more in the eastern part of the country. New York is by far the biggest donor state for black migrants to the South, moving to the South Atlantic states rather than to Texas and in the southwest." *Id.*

123. See *id.* Frey remarked that "we've seen the South really come on like gangbusters during the 80's and 90's, especially in the South Atlantic states." *Id.* He contributed the black migration to the South to this economic climate, as well as the "changed racial climate." *Id.*

vated by a desire among many affluent and successful African-Americans who have made their fortunes in the North to return south of the Mason-Dixon line to their roots within the United States.<sup>124</sup> Many still have family in the South who did not partake in the great northern migration during the first half of this century and after World War II.<sup>125</sup> Many had memories of families and stories that create connections with the South.<sup>126</sup> Because the migration to the South has largely been by African-Americans, Ingram's anti-Yankee covenant, though arguably racially neutral, would disparately affect African-Americans.

Mr. Ingram's discriminatory purpose is reflected once again in his words. The covenant intended to preserve a way of life that was based on state-enforced limitations of individual freedoms based solely on the color of people's skin. Mr. Ingram is seeking to revive this lost world through his restrictive covenant. Not only is his discriminatory purpose clear, but in light of the evidence of the racial composition of who would likely constitute a "Yankee" seeking to buy property in the South, the discriminatory impact is also clear. Proof of discriminatory purpose and discriminatory impact is enough to support a violation of the Equal Protection Clause<sup>127</sup> by a law that is facially neutral.<sup>128</sup> Therefore, even if Ingram's use of the word "race" is read neutrally, his covenant violates the Fourteenth Amendment.

### C. Right to Travel

A constitutional lawyer defending Mr. Ingram's covenant would undoubtedly argue that the restriction based on being a member of the "Yankee" race is not a racial categorization, but one based on state citizenship or residency. Since state citizenship is not a suspect classification for equal protection purposes, the covenant will be subject to rationality review and would therefore be

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124. *See id.* Frey also reported that the presence of a large black community is a factor that aided black professionals in deciding to move to the South. *See id.*

125. *See id.* As the culture has changed since civil rights legislation was enacted, there are a variety of jobs available to all races. *See id.* The fact that blacks have retirement-aged family in the South, coupled with the availability of jobs, makes it an easier choice for blacks to migrate South. *See id.*

126. *See id.* (explaining that African-Americans in their early fifties and of retirement age, especially, are returning to South to be near friends and family).

127. *See* U.S. CONST. amend. XIV, § 1. For a discussion of racial classification under the Equal Protection Clause, see *supra* notes 100-04, 106-09 and accompanying text.

128. *See* *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) (holding that evidence of discriminatory intent not sufficient for Equal Protection claim unless accompanied by evidence of discriminatory impact).

upheld (perhaps on the grounds of conservation). This argument would be flawed. The State cannot discriminate among individuals using certain categories such as race; in addition, it cannot make distinctions among individuals that would interfere with fundamental rights.<sup>129</sup> If the covenant is recharacterized as a restriction based on state citizenship or residency, it becomes an abridgement of the fundamental right to travel under the Equal Protection Clause.<sup>130</sup> As an abridgement of the fundamental right to travel, the covenant would be subject to strict scrutiny.<sup>131</sup>

The right to travel consists of several rights associated with interstate mobility in a federal system. Foremost is the right of outsiders to utilize the instate legislative and judicial processes, a right established in *Crandall v. Nevada* in 1867, prior to the passage of the Fourteenth Amendment.<sup>132</sup> Since such a right was found by the Court prior to the Fourteenth Amendment's enactment, its source must be found in the structure of the United States Constitution.<sup>133</sup> Challengers of Mr. Ingram's covenants cannot rely on this strand of the right of interstate mobility because legislative and judicial process is not at issue. Instead, the covenants violate an out-of-stater's purely private right to purchase property.

An analogy can be made to state requirements that out-of-staters reside in state for a certain duration before being entitled to welfare benefits. In *Shapiro v. Thompson*,<sup>134</sup> the Court held that durational residence requirements that condition the receipt of benefits on length of residence violate the fundamental right to travel.<sup>135</sup> Although the right to purchase property is not an entitle-

129. See *supra* note 62-69, 101-04 and accompanying text.

130. See U.S. CONST. amend. XIV, § 1. See also GUNTHER & SULLIVAN, *supra* note 99, at 335-36 (noting that "[t]he Court has long recognized a constitutionally protected interest in migrating from state to state").

131. See GUNTHER & SULLIVAN, *supra* note 99, at 905-09 (discussing how *Shapiro v. Thompson*, 394 U.S. 618 (1969), "launched strict scrutiny of durational residence requirements"). For a discussion of the *Shapiro* case, see *infra* notes 134-38 and accompanying text.

132. See generally *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

133. See GUNTHER & SULLIVAN, *supra* note 99, at 335-36. Foremost is the right of outsiders to utilize state legislative and judicial processes, a right established in *Crandall* prior to the passage of the Fourteenth Amendment. See *Crandall*, 73 U.S. (6 Wall.) 35-37. Since the Court found such a right prior to the Fourteenth Amendment's enactment, its source must be in the structure of the U.S. Constitution. See *id.* (striking down discriminatory tax because it infringed on citizen's "right to come to the seat of the [national] government . . .").

134. 394 U.S. 618 (1969).

135. See *Shapiro*, 394 U.S. at 641-42. In *Shapiro*, several cases were consolidated and brought as one action. See *id.* at 622-27. Each of the plaintiffs moved to a new state and applied for welfare benefits. See *id.* They were all denied these benefits on the basis of state statutes that set a minimum residency duration requirement

ment in the same sense that welfare benefits are, the Court has interpreted its precedent set in *Shapiro* as holding residence requirements, which penalize out-of-staters with respect to an entitlement, unconstitutional.<sup>136</sup>

Mr. Ingram's covenants penalize out-of-staters analogously to the durational requirements struck down in *Shapiro*. Southerners who go north of the Mason-Dixon line for a year or more lose their right to buy Mr. Ingram's property.<sup>137</sup> Although they can still buy other property in the South, the restriction on Mr. Ingram's plantation, in essence, penalizes Southerners who exercise their right to travel. Just as the restrictions on welfare eligibility struck down in *Shapiro* were designed to dissuade immigration into states with generous welfare benefits,<sup>138</sup> Mr. Ingram's covenants serve to prevent emigration to the North. The restrictions in Mr. Ingram's deed are the obverse of the restrictions in *Shapiro*; they punish individuals for not residing in the state for a certain duration.

The Court's jurisprudence on the fundamental right to travel is intimately linked with its jurisprudence on the dormant Commerce Clause<sup>139</sup> and the Article IV Privileges and Immunities Clause.<sup>140</sup> This connection becomes important because judicial enforcement of Mr. Ingram's covenant would also constitute an undue interference with interstate commerce and discrimination

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that the plaintiffs had to meet before being eligible for benefits. *See id.* The plaintiffs brought this action to challenge the constitutionality of these state statutes. *See id.*

136. *See* *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 269 (1974) (holding durational residency requirements that penalized out-of-staters were subject to strict scrutiny where existence of penalty was determined by reference to burden on necessity of life).

137. For the language of the covenants, see *supra* note 2 and accompanying text.

138. For a discussion of the *Shapiro* case, see *supra* notes 134-37 and accompanying text.

139. *See* U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause provides Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." *Id.* For a discussion of the dormant Commerce Clause, see GUNTHER & SULLIVAN, *supra* note 99, at 259-60 (stating that although text of Constitution nowhere expressly limits state power to regulate interstate commerce, Supreme Court has read judicially enforceable limits on state legislation when Congress has chosen not to act).

140. *See* U.S. CONST. art. IV, § 2, cl. 1. The Privileges and Immunities Clause states that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.* *See also* GUNTHER & SULLIVAN, *supra* note 99, at 328 (stating that like Commerce Clause, Privileges and Immunities Clause serves as "restraint on state efforts to bar out-of-staters from access to local resources").

against out-of-staters.<sup>141</sup> Although early Supreme Court cases held that “commerce” did not include movement of people, the Court in *Heart of Atlanta Motel, Inc. v. United States*<sup>142</sup> held that Congress’s power to regulate commerce includes its power to regulate the interstate movement of people.<sup>143</sup> Since Congress’s power to regulate interstate commerce is exclusive, a state’s regulation that places a burden on interstate commerce is unconstitutional under the dormant Commerce Clause doctrine.<sup>144</sup>

The Court has distinguished, however, between state statutes that facially impose limits on commerce and statutes that merely adversely affect commerce: the first are subject to review under strict scrutiny, the second are subject to intermediate scrutiny using a balancing test.<sup>145</sup> The argument can be made that Mr. Ingram’s covenants facially restrict interstate commerce by prohibiting those who live in the North from buying his property.<sup>146</sup> Because of the

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141. See *Edwards v. California*, 314 U.S. 160 (1941) (striking down “anti-Okie law” as violating dormant Commerce Clause and Article IV Privileges and Immunities Clause). The “anti-Okie law” provided: “[e]very person, firm or corporation or officer or agent thereof that brings or assists in bringing any indigent person who is not a resident of [California], knowing him to be an indigent person, is guilty of a misdemeanor.” *Id.* at 171. The majority opinion relied on the Commerce Clause to strike down the state law and the concurring opinions relied on the Privileges and Immunities Clause. See *id.* at 177-86. See also, GUNTHER & SULLIVAN, *supra* note 99, at 336 (noting that while Court unanimously struck down law, majority opinion relied on Commerce Clause).

142. 379 U.S. 241 (1964).

143. See *id.* at 261. In *Atlanta Hotel*, the owner of a Georgia hotel restricted its clientele, three-fourths of which were transient interstate travelers, to white people. See *id.* at 243-44. The hotel owner sought a declaratory judgment, attacking the constitutionality of Title II of the Civil Rights Act of 1964, claiming this Act exceeded Congress’s power to regulate commerce. See *id.* at 242-43.

144. See *id.* at 253-62 (providing historical background of this doctrine as set forth by the Supreme Court in 1824 in *Gibbons v. Ogden*). The Atlanta Hotel Court quoted the *Gibbons* Court, stating, “[t]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution . . . . If, as has always been understood, the sovereignty of Congress . . . is plenary as to those objects [specified in the Constitution], the power over commerce . . . is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States . . . .” *Id.* at 255 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824)).

145. See GUNTHER & SULLIVAN, *supra* note 99, at 270-71. See also *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating facially discriminatory law by employing strict scrutiny standard); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (striking down a neutral law that unduly burdened interstate commerce by applying a balancing approach).

146. See GUNTHER & SULLIVAN, *supra* note 99, at 271 (noting that state law is facially discriminatory when it “overly” blocks flow of interstate commerce or, “by [its own] terms, treat[s] out-of-state economic interests differently than their local competitors”).



facial discrimination against interstate commerce, the covenant must be closely tailored to a substantial state interest; more than likely, it will fail to meet such a high standard.<sup>147</sup> In addition, such a restriction that facially discriminates against out-of-staters would violate the Privileges and Immunities Clause of Article IV of the Constitution.<sup>148</sup> Mr. Ingram's covenants do not meet constitutional standards, neither from the perspective of the fundamental right to travel nor from constitutional provisions that limit state burdening of interstate commerce.

#### D. Fair Housing Act

The Fair Housing Act sanctions both private and public discrimination based on race, ethnicity, religion, or national origin in the sale or rental of real property.<sup>149</sup> Since the Act covers private actors, state action is not an issue, and Mr. Ingram's covenants will be directly subject to the Act's provisions.<sup>150</sup> Because the Act prohibits the recording of deeds that impose racially restrictive covenants, Mr. Ingram's deeds would violate the Act.<sup>151</sup> The only room for argument is that the restriction is not racial.<sup>152</sup> On this point, we incorporate by reference our discussion from above on whether the "Yankee race" constitutes a racial restriction.

### IV. CONCLUSION

It's bad manners and probably unconstitutional to discriminate against people just because they don't eat grits

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147. See *id.* at 270 (noting Supreme Court's opposition to overt discrimination to citizens outside state). These commentators note that "[a] state law that on its face discriminates against out-of-state commerce is subject to an extraordinarily strong presumption of invalidity, and will virtually always be struck down." *Id.*

148. For a discussion of the Privileges and Immunities Clause of Article IV and its effect on restrictive covenants, see *supra* note 140 and accompanying text.

149. See Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1994).

150. Note that the recording of Ingram's covenants by the South Carolina Registrar of Deeds would constitute state action in violation of the U.S. Constitution. See, e.g., *Mayers v. Ridley*, 465 F.2d 630, 635 (D.C. Cir. 1972) (holding that Recorder of Deeds is state official and activities of Recorder's Office are state responsibility).

151. See 42 U.S.C. § 3604 (providing that it shall be unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin . . .").

152. For a discussion on whether "Yankee race" constitutes a racial restriction, see *supra* notes 101-28 and accompanying text.

and fried fatback for breakfast, and had the bad luck to be born above of the Mason-Dixon line.

—*Atlanta Journal and Constitution*.<sup>153</sup>

When analyzed as a partial, direct restraint on alienation, Mr. Ingram's covenants serve little purpose other than drawing distinctions between people based on their state of origin. Such distinctions violate the Equal Protection Clause, as well as the Privileges and Immunities Clause and the Commerce Clause of the United States Constitution. In addition to limiting the fundamental right to travel and discriminating against interstate commerce on the basis of race, Mr. Ingram's covenants, forbidding Yankees from purchasing Delta Plantation, violate the Federal Fair Housing Act. For the reasons elaborated above, Mr. Ingram is surely "whistling in the wind."

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153. Jim Mitner, *Northerners Need Education, Not Isolation*, ATLANTA J. & CONST., Feb. 19, 1998, at 11.

